

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ATMEL CORPORATION, a Delaware  
corporation; ATMEL SWITZERLAND, a  
corporation; ATMEL FRANCE, a  
corporation; ATMEL SARL, a  
corporation,

Plaintiffs,

v.

AUTHENTEC, INC., a Delaware  
corporation,

Defendant.

No. C 06-2138 CW

ORDER DENYING  
DEFENDANT'S MOTION  
FOR LEAVE TO FILE A  
MOTION FOR  
RECONSIDERATION OR  
FOR CERTIFICATION  
FOR INTERLOCUTORY  
APPEAL

Defendant Authentec, Inc. moves for leave to file a motion for reconsideration of the Court's June 11, 2007 order denying its motion to dismiss Plaintiffs' claims for lack of standing. In the alternative, Defendant seeks certification of the of the issue for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

I. Leave to File a Motion for Reconsideration

Civil Local Rule 7-9(a) states as follows: "No party may notice a motion for reconsideration without first obtaining leave of Court to file the motion." A request for leave to file a motion for reconsideration may only be granted if the moving party shows:

(1) That at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is

sought. The party also must show that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order; or (2) The emergence of new material facts or change of law occurring after the time of such order; or (3) A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order.

Civil L.R. 7-9(b).

Defendant argues that "upon re-reviewing the record" it discovered information that undermines Plaintiffs' arguments regarding the existence of subject matter jurisdiction. Defendant also cites the underlying declarations in Steelcase v. Smart Technologies Inc., 336 F. Supp. 2d 714 (W.D. Mich. 2004), which the Court cited in denying Defendant's motion. However, neither of these sources of information warrants leave to file a motion for reconsideration under Rule 7-9. The information in the record was clearly available to Defendant at the time it filed its motion to dismiss and Plaintiffs relied upon Steelcase in their opposition to Defendant's motion. Defendant does not provide any reason that it was not able to obtain the Steelcase declarations prior to filing its reply brief.

Defendant also argues that it need not seek leave to file a motion for reconsideration because it alleges that the Court lacks subject matter jurisdiction and objections to subject matter jurisdiction may not be waived. See Cripps v. Life Ins. Co., 980 F.2d 1261, 1264 (9th Cir. 1992). Out of an abundance of caution, the Court considers the merits of Defendant's motion for leave to file a motion for reconsideration and finds that its arguments are unavailing. Defendant argues that the evidence demonstrates that

1 there was at least one other non-exclusive licensee to the '114  
2 patent and therefore Atmel Corporation could not have been  
3 considered an exclusive licensee. However, the document Defendant  
4 cites in support of that argument is dated January, 2000. Atmel  
5 Corporation did not file its complaint until March, 2006. Further,  
6 in a document dated May, 2006, Atmel Grenoble, the patentee,  
7 warranted that it had "not granted any licenses or other rights" to  
8 the '114 patent. DeMory Declaration in Support of Defendant's  
9 Motion to Dismiss at 5. Further, the fact that Plaintiffs'  
10 situation in this case was not factually identical to that of the  
11 plaintiffs in Steelcase does not undermine the Court's overall  
12 analysis.

13 Thus, the Court denies Defendant's motion for leave to file a  
14 motion for reconsideration.

#### 15 II. Interlocutory Appeal

16 Pursuant to Title 28 U.S.C. § 1292(b), the district court may  
17 certify appeal of an interlocutory order if (1) the order involves  
18 a controlling question of law, (2) appealing the order may  
19 materially advance the ultimate termination of the litigation, and  
20 (3) there is substantial ground for difference of opinion as to the  
21 question of law. The Court should construe the requirements for  
22 certification strictly, and grant a motion for certification only  
23 when exceptional circumstances warrant such action. Coopers &  
24 Lybrand v. Livesay, 437 U.S. 463, 475 (1978).

25 Defendant argues that there is a substantial ground for  
26 difference of opinion as to the Court's conclusion that Atmel  
27 Corporation had constitutional standing at the inception of the  
28

1 case because the Federal Circuit has not yet held that a parent  
2 company acting as Atmel Corporation did under the same  
3 circumstances could be considered an exclusive licensee. While the  
4 lack of Federal Circuit authority demonstrates that this point of  
5 law is both arguable and new, Defendant does not provide any cases  
6 that contradict the decision that are directly on point.

7 Defendant also argues that interlocutory appeal is appropriate  
8 because there is a possibility that the case might be dismissed on  
9 appeal due to a lack of subject matter jurisdiction. However, this  
10 is true of any case in which subject matter jurisdiction is  
11 contested. Interlocutory decisions not to dismiss a case for lack  
12 of subject matter jurisdiction are "not per se reviewable." Things  
13 Remembered v. Petrarca, 516 U.S. 124, 132 n.1 (1995) (Ginsburg, J.,  
14 concurring). Because "every federal court, whether trial or  
15 appellate, is obliged to notice want of subject-matter jurisdiction  
16 on its own motion," the question will be left "open for eventual  
17 appellate consideration." Id.

18 The Court finds that there are no extraordinary circumstances  
19 warranting certification for interlocutory appeal in this case.

20 CONCLUSION

21 For the foregoing reasons, the Court DENIES Defendant's motion  
22 for leave to file a motion for reconsideration or for certification  
23 for interlocutory appeal (Docket No. 79).

24 IT IS SO ORDERED.

25  
26 Dated: 6/29/07



27 CLAUDIA WILKEN  
28 United States District Judge

**United States District Court**  
For the Northern District of California

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